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No. 96-11

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
ROBERT E. KIRSCHMAN, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly held that federal regulation of petitioners' marketing of almonds, pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, did not constitute a taking of petitioners' property without just compensation in violation of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-11a) is unpublished, but the decision is noted at 73 F.3d 381 (Table). The opinion of the Court of Federal Claims (Pet. App. 13a-21a) is reported at 30 Fed. Cl. 244.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1995. A petition for rehearing was denied on April 1, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on July 1, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act (AMAA) of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders to maintain market stability for certain agricultural commodities, including almonds. 7 U.S.C. 608c(1), (2) and (3). As relevant here, the orders may limit the quantities of a covered agricultural commodity that "handlers" or processors of the commodity may market, 7 U.S.C. 608c(6)(A), and may establish reserve pools of the commodity, 7 U.S.C. 608c(6)(E), to aid in achieving orderly market conditions. Pursuant to that authority, the Secretary has promulgated a marketing order regulating the handling of almonds grown in California. 7 C.F.R. 981.1-981.92. The California almond industry has been regulated pursuant to the AMAA since 1949. 7 U.S.C. 608c note.

The almond marketing order is administered by the Almond Board of California (the Board), a body composed of industry representatives appointed by the Secretary. 7 C.F.R. 981.30-981.40.[1] The duties of the Board include investigating and collecting data concerning growing, shipping, and marketing conditions with respect to almonds, and furnishing pertinent market information to the Secretary. 7 C.F.R. 981.39. The Board is further authorized to recommend to the Secretary, based on anticipated crop yields and prospective product demand, the

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[1] The members of the Board serve without compensation and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d). The Board is responsible for, among other things, recommending a yearly budget for administering the marketing order, which the Secretary may accept or reject.

amount of the annual reserve, 7 C.F.R. 981.49, and the level of assessments to be charged to handlers for their pro rata share of the costs of the Board's production and marketing research activities, 7 C.F.R. 981.41. See Pet. App. 15a. The Board collects all assessments imposed on handlers by the Secretary. See *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1192-1193 (9th Cir. 1990).

When the Board recommends, and the Secretary approves, an almond reserve in any particular crop year, the marketing order directs each handler to "withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year." 7 C.F.R. 981.50. The order further provides that almonds held in reserve must be delivered to the Board for disposition by it, with net proceeds being remitted to the handler, 7 C.F.R. 981.51, 981.66(a) and (g), unless the handler requests authorization from the Board to act as its agent in disposing of the almonds, 7 C.F.R. 981.67. The order permits the Board to authorize handlers to act as agents "upon such reasonable terms and conditions * * * as the Board may specify." *Ibid.* Those "terms and conditions"—which, among other things, regulate how and where almonds held in reserve may be sold—are contained in "agency agreements." The agency agreements are proposed by the Board and approved by the Department of Agriculture.

2. Petitioners are producers and handlers of California almonds subject to the marketing order. They filed a complaint in the Court of Federal Claims, alleging that reserve requirements prescribed by the

almond marketing order for crop years 1982-1985, 1988, and 1990 significantly reduced the returns they received for reserved almonds in those years.[2] Petitioners contended that that diminution in value constituted a "taking" of their property without just compensation, in violation of the Fifth Amendment. Petitioners sought compensation for alleged lost profits, for assessments attributable to Board expenses, and for their costs associated with storing almond reserves. Pet. App. 7a-8a, 14a.

The Court of Federal Claims dismissed petitioners' complaint for failure to state a claim on which relief could be granted. Pet. App. 14a-21a. Observing that "[o]ne who 'embarks in a business which public interest demands . . . be regulated . . . must know regulation will ensue'" (*id.* at 19a-20a (quoting *Nebbia* v. *New York*, 291 U.S. 502, 534 (1934)), the court held that, in light of the pervasive federal regulation of the agriculture industry during the past half-century, "plaintiffs cannot reasonably assert a property interest in their almond crops free of Government control." Pet. App. 20a.

The Court of Federal Claims rejected petitioners' contention that the regulations at issue here extend beyond what petitioners reasonably could have anticipated when they entered the market. The court explained that "commercial dealings subject to regulatory control must contend with the possibility that the 'legislative scheme [may be] buttressed by subse-

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[2] Petitioners incorrectly assert that "[t]he present case arose from several administrative petitions filed by the Petitioners in this case." Pet. 8. This action arose from the filing of a complaint in the Court of Federal Claims and is independent of the administrative petitions filed by petitioners with respect to the almond marketing order. See Pet. 10-11.

quent amendments to achieve the legislative end.'" Pet. App. 20a (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986)).[3]

3. The court of appeals affirmed. Pet. App. 7a-11a. The court first observed that, in order "[t]o be a property interest within the meaning of the Fifth Amendment, the interest at issue must be 'sufficiently bound up with the reasonable expectations of the claimant to constitute "property."'" *Id.* at 9a (quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-125 (1978)). Because the regulatory restrictions to which petitioners object represent well-established marketing order provisions that existed before petitioners entered the industry, the court concluded that petitioners "could have had no reasonable expectation that the applicable regulatory scheme would not be enforced." Pet. App. 10a.

The court acknowledged that, even in a highly-regulated industry, a regulation "which goes too far can effectuate a taking." Pet. App. 10a. It concluded, however, that the marketing order provisions at issue here are tailored to benefit consumers as well as petitioners and other members of the almond industry, and do not rise to the level of a taking of property. *Ibid.*

Finally, the court "discern[ed] no factual or legal basis" for petitioners' contention that the reserve

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[3] The court also questioned in dictum petitioners' contention that the almonds held in reserve represent a separable component of property, distinct from the remainder of their annual crops. The court stated that "[i]t is at least arguable * * * that correctly defined, plaintiffs' 'property' consists of the *entirety* of their respective annual crops." Pet. App. 21a n.4.

requirements should be considered a "*per se* taking[]" under the principles of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. 9a n.2.

ARGUMENT

1. a. The court of appeals correctly held that the challenged marketing order did not effect a regulatory taking under this Court's Fifth Amendment jurisprudence. It is well-settled that not every economic interest or expectancy is "property" for purposes of the Fifth Amendment. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502 (1945). To possess a Fifth Amendment property interest in an economic benefit, a party "must have more than an abstract need or desire for it * * * [or] a unilateral expectation of it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The party "must, instead, have a legitimate claim of entitlement to it." *Ibid.* Only those rights which "have the law back of them" are recognized as property within the meaning of the Just Compensation Clause. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979); *Willow River Power Co.*, 324 U.S. at 502.

Accordingly, this Court's takings cases have "engag[ed] in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna*, 444 U.S. at 175; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Applying those principles, the court of appeals correctly held that petitioners failed to demonstrate a compensable prop-

erty interest that was taken under the regulatory scheme of the AMAA.

Each of the petitioners came into existence and entered the California almond industry after the industry had become regulated pursuant to the AMAA, and after almond reserves had begun to be imposed by the Secretary. Almond reserve requirements were imposed pursuant to the AMAA throughout the 1950s and 1960s (see Gov't C.A. Br. 216, 225, 233), and for the 1976-1977 and 1981-1982 crop years (see 47 Fed. Reg. 42,961 (1982)), while petitioners were incorporated and entered the industry between 1975 and 1986, and challenge reserve requirements imposed in the 1982-1983 crop year and thereafter.[4] Petitioners therefore plainly lacked a "reasonable investment backed expectation[]," *Kaiser Aetna*, 444 U.S. at 175, that they would be entitled to operate free of the challenged provisions of the almond marketing order.

In addition, the economic impact of the reserve requirements on petitioners' operations was minimal. As the Court of Federal Claims observed (Pet. App. 21a n.4), the great majority of petitioners' almonds were never held in reserve under the marketing order, but were instead sold by petitioners in the open

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[4] Petitioner Cal-Almond, Inc., was incorporated on April 3, 1979. C.A. App. 239. Petitioner Gold Hills Nut Company, Inc., was incorporated on October 21, 1986. *Id.* at 240. Petitioner Saulsbury Orchards and Almond Processing, Inc., was incorporated on December 1, 1977. *Id.* at 241. Petitioner Mac Enterprises, Inc., was incorporated on May 28, 1975. *Id.* at 242. Petitioner Van Kay, Inc., was incorporated on December 17, 1980. *Id.* at 243.

market.[5] Moreover, handlers subject to the reserve requirements retain the rights to (1) receive all proceeds from the sale of almonds that are temporarily held in reserve but that the handler subsequently sells in the open market to the buyer of its choice; (2) receive all proceeds from the sale of almonds held in reserve and sold in alternative outlets; (3) determine in which reserve outlets they will market their almonds, should they exercise the option of selling the reserves in an alternative market instead of relinquishing them to the Board; and (4) retain continual physical control and custody over the almonds once a reserve is announced, unless they elect to relinquish the almonds to the Board. 7 C.F.R. 981.52, 981.66(g) and 981.67.

Further, as the court of appeals recognized (Pet. App. 10a), the reserve requirements are part of a larger regulatory scheme that substantially benefits producers and handlers such as petitioners by

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[5] Petitioners err in characterizing the "property" at issue as only those portions of their almonds that were held in reserve pursuant to the marketing order. As the Court observed in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987):

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* * * * .

Id. at 497 (quoting *Penn Central*, 438 U.S. at 130-131); see also *Concrete Pipe & Products, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993) ("a claimant's parcel of property [cannot] first be divided into what was taken and what was left" to demonstrate a compensable taking).

sustaining orderly marketing conditions for the commodity they sell. See *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533, 572 (1939); see also *Carruth* v. *United States*, 627 F.2d 1068 (Ct. Cl. 1980) (rejecting takings challenge to AMAA implementing regulations covering peanuts); cf. *Penn Central*, 438 U.S. at 134-135 ("We cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law."). The "character of the governmental action," *Kaiser Aetna*, 444 U.S. at 175, therefore strongly supports the court of appeals' holding.

b. Contrary to petitioners' contention (Pet. 13), the court of appeals did not hold "that the protection of [the] Fifth Amendment [J]ust [C]ompensation [C]lause is lost to those who enter" a heavily regulated industry. The court expressly rejected that proposition. See Pet. App. 10a ("This is not to say that in a highly regulated industry the government may regulate away all property interests."). The court correctly held (*id.* at 10a-11a) that where, as here, the regulatory restrictions to which a complainant objects were in place before the complainant obtained the subject property or entered the industry at issue, it cannot claim a reasonable expectation to be free of those very restrictions. See *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (*Penn Central*'s requirement of "interference with distinct investment-backed expectations [limits] recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime"); see also *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449, 454 (2d Cir. 1995) ("the critical time for considering investment-backed expectations is the time a property is acquired, not

the time the challenged regulation is enacted"); cf. *Clajon Production Corp.* v. *Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995). By contrast, in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), cited by petitioners (Pet. 16), the challenged regulatory scheme was imposed after the complainant obtained the subject property. See *Lucas*, 505 U.S. at 1006-1007; see also *Penn Central*, 438 U.S. at 115-116.[6]

2. Petitioners next contend (Pet. 16-22) that the reserve requirement should be viewed as a per se taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court in *Loretto*, however, stressed that its holding was a "narrow" one, *id.* at 441, merely reaffirming the established rule that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve," *id.* at 426. In such cases, "the property owner entertains a historically rooted expectation of compensation." *Id.* at 441.

Here, by contrast, petitioners retained the right to physical possession of their property, as well as other meaningful rights of ownership. Contrary to petitioners' contention (Pet. 24), this Court's decisions "uniformly reject the proposition that diminution in

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[6] Petitioners' reliance (Pet. 13-14) on *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), in opposition to the requirement of reasonable preexisting expectations is misplaced. There, the Court observed that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge." *Id.* at 2320. The Court did not abandon the central principle that the existence of a property interest in being free of particular governmental regulation is dependent on the backdrop of preexisting rights and investment-backed expectations.

property value, standing alone, can establish a 'taking'" that requires compensation by the government. *Penn Central*, 438 U.S. at 131; see also *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) ("perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests").[7]

United States v. *Pewee Coal Co.*, 341 U.S. 114 (1951), and *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), cited by petitioners (Pet. 22, 20), are similarly inapposite. In *Pewee Coal*, the government took possession and control of privately-held coal mines in response to a nationwide strike. Concluding that the government's action amounted to "possess[ion] and operat[ion]" of a private business for public use, 341 U.S. at 117, the Court found that a taking had occurred. In *Nixon*, a federal statute divested the former President of "complete possession and control" of presidential documents created during his terms of office. 978 F.2d at 1284. The court held that divestment to be a per se taking because "Mr. Nixon had a well grounded expectation

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[7] Petitioners rely on the language of 7 C.F.R. 981.52, which requires handlers to hold reserve almonds in storage "for the account of the Board," as evidence that ownership of the reserve almonds passes to the Board, thereby effecting a "per se" taking. Pet. 17, 21. The cited regulatory language does not denote a transfer of ownership, however. It merely requires handlers to segregate almonds held in reserve, for purposes of inspection and record-keeping. See 7 C.F.R. 981.10, 981.56, 981.71; *Cal-Almond, Inc.* v. *United States Department of Agriculture*, 14 F.3d 429, 448 (9th Cir. 1993) ("Even then, they are not really held for the account of the Board in the sense of the Board's receiving the proceeds from the disposition thereof, because the handlers get those proceeds."); Pet. App. 63a.

of ownership" based on "[h]istory, custom, and usage." *Id.* at 1270, 1284. Here, by contrast, there has been no physical occupation, and petitioners have failed to demonstrate a reasonable expectation of operating their businesses free of the preexisting marketing orders.

3. Finally, petitioners contend (Pet. 23-24) that the decision below conflicts with *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), and with *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). In those cases, the Court considered land-use regulations that imposed as a condition on the approval of property development the requirement that the owners provide public access across their property. This case is quite different from *Dolan* and *Nollan* because it involves commercial regulation of personal property, see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. at 1027-1028, and because petitioners lacked reasonable investment-backed expectations that they would have a right to operate in the almond market free of the aspect of commercial regulation to which they now object. *Id.* at 1030. In any event, for the reasons discussed above, the reserve requirement "'substantially advance[s] legitimate [governmental] interests' and does not 'den[y] an owner economically viable use of his [property].'" *Dolan*, 114 S. Ct. at 2316. The court of appeals therefore correctly rejected petitioners' takings claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
ROBERT E. KIRSCHMAN, JR.
Attorneys

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